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U.S. Department of Homeland Security  
500 C Street, SW  
Washington, DC 20472

FEMA REGION VI  
MANAGEMENT DIVISION

2009 DEC -1 PM 1:29



FEMA

November 27, 2009

Clerk of the Board  
Civilian Board of contract Appeals  
1800 M Street, N.W.  
6<sup>th</sup> Floor  
Washington, D.C. 20036

DOCKET NUMBER: CBCA-1787-FEMA

Dear Sir of Madame:

Please find attached the Response of Federal Emergency Management Agency (FEMA) to the arbitration request submitted by Sabine Pass Port Authority, Jefferson County, Texas, filed as CBCA-1787-FEMA. Submitted with the Response is a binder of exhibits.

**Please add the following Office of Chief Counsel contacts for all notices and correspondence to FEMA related to the arbitration hearing: Linda M. Davis, Associate Chief Counsel-Program Law Division, 202-646-3327 or [lindam.davis@dhs.gov](mailto:lindam.davis@dhs.gov); and Kim A Hazel, Senior Counsel-Program law Division, 202-646-4501 or [kim.hazel@dhs.gov](mailto:kim.hazel@dhs.gov).**

Very truly yours,

A handwritten signature in cursive script that reads "Diane L. Donley".

Diane L. Donley  
Senior Attorney  
Office of chief Counsel  
DHS/Federal Emergency Management Agency  
500 C St., S.W.  
Washington, D.C. 20472

BY NEXT DAY DELIVERY

cc: To the Applicant:

Kathleen Hicks  
Sabine Pass Port Authority  
5960 South First Ave  
Sabine Pass, TX 77655

To the State:

Ben Patterson  
State Coordinating Officer  
Texas Division of Emergency Management  
5805 N. Lamar Blvd  
Austin, TX 78752

To the Region:

Gary Jones  
Acting Administrator, Region VI  
Federal Emergency Management Agency  
Department of Homeland Security  
800 N. Loop 288  
Denton, TX 76209

**SABINE PASS PORT AUTHORITY, SABINE, TEXAS  
FEMA DENIAL OF REQUEST FOR PUBLIC ASSISTANCE  
FEMA-1606-DR-TX  
DOCKET #CBCA 1787-FEMA**

**RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO  
ARBITRATION REQUEST OF SABINE PASS PORT AUTHORITY**

On October 30, 2009, the Federal Emergency Management Agency ("FEMA") received the request of the Sabine Pass Port Authority ("SPPA") to arbitrate FEMA's denial of its Request for Public Assistance ("RPA"). The following constitutes FEMA's response to the Applicant's arbitration request.

**JURISDICTION**

SPPA invokes jurisdiction pursuant to the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164-166 (2009), which establishes a new option, arbitration, under the Public Assistance (PA) program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX, and DR-1607-LA. See 44 C.F.R. § 206.209.

SPPA met some of the regulatory guidelines for filing an arbitration request as outlined in 44. C.F.R. § 206.209 as follows:

- The arbitration request exceeds the \$500,000 project threshold.<sup>1</sup>
- FEMA responded to the SPPA's first appeal on March 24, 2008.
- SPPA submitted a second appeal on August 4, 2008.
- FEMA responded to the SPPA's untimely second appeal on June 23, 2009.

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<sup>1</sup> FEMA has no independent information on the Applicant's damage and reserves the right to dispute whether the \$500,000 project threshold has been met.

- SPPA filed the arbitration request by letter dated October 28, 2009, with all supporting documentation.
- SPPA met the October 30, 2009 arbitration request submittal deadline for appeals pending from February 17, 2009.

However, SPPA has not met all of the jurisdictional requirements and thus, its arbitration request must be dismissed.

### **SUMMARY OF FEMA'S POSITION**

SPPA submitted its Request for Public Assistance (RPA) on December 28, 2007, more than two (2) years past the regulatory deadline for RPA submissions. SPPA has not demonstrated extenuating circumstances beyond its or the grantee's control that would justify extending the RPA submittal deadline more than two years beyond the regulatory time period. See 44 CFR § 206.202 (f) (2). In fact, the Port Commissioner and SPPA's attorney were aware of the need to seek assistance to rebuild SPPA's boat dock as early as a meeting on September 29, 2005, where the SPPA Board tasked the attorney to seek assistance for the Port. Accordingly, the Panel should deny SPPA's request that FEMA accept its untimely RPA submission.

### **BACKGROUND**

#### **The Stafford Act**

FEMA, a component agency of the United States Department of Homeland Security, is responsible for, among other duties, administering and coordinating the Federal governmental response to Presidentially-declared disasters pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act").<sup>2</sup> See 42 U.S.C.

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<sup>2</sup> The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. See 42 U.S.C. § 5164.

§§ 5121 *et seq.* The Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area to be a “major disaster.” See 42 U.S.C. § 5170; 44 CFR §§ 206.36; 206.38. When a disaster is declared, the President determines the types of discretionary assistance that may be made available in the area he has determined is encompassed by the incident, the “declared area.” See 42 U.S.C. § 5170.

### **The Declaration**

On September 23, 2005, the President issued a major disaster declaration for the State of Texas as a result of Hurricane Rita pursuant to his authority under the Stafford Act. See 42 U.S.C. § 5170. This declaration authorized Public Assistance (“PA”) funding for all 254 counties in the State of Texas for debris removal and emergency protective measures. See Exhibit 1. On October 3, 2005, the declaration was amended to include PA funding for permanent restoration of public facilities (Categories C through G) for certain counties within the State of Texas, including Jefferson County. See Exhibit 2. Thus, the State of Texas is the grantee for all FEMA Public Assistance delivered in the State. See 44 CFR § 206.201(e). The Sabine Pass Port Authority is, therefore, a potential subgrantee of the State. See 44 CFR § 206.201(l).

Under the Stafford Act and its regulations, FEMA may provide, *inter alia*, PA, that is, FEMA “may make contributions” for the repair, restoration, and replacement of damaged facilities. See 42 U.S.C. § 5172. This Stafford Act section and its duly promulgated regulations allow FEMA, in its discretion, to provide disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the applicant, facility, and work meet eligibility requirements. See 44 C.F.R. §§ 206.200 - .206. PA

funding can be provided in the form of grants for the state or local government's own recovery efforts, 44 C.F.R. § 206.203, or FEMA may fund direct federal assistance through which a federal agency performs the recovery work. See 44 C.F.R. § 206.208. Funding is provided in the form of grants to the state, as grantee, and the grantee distributes funding in the form of subgrants to an eligible applicant, as subgrantee. See 44 C.F.R. § 206.201(d), (e), (k), and (l).

To receive PA, the grantee, the State, must first submit a completed Request for Public Assistance (RPA) for each applicant seeking assistance. See 44 CFR § 206.202(c). The Grantee is responsible for, *inter alia*, "ensuring that all potential applicants are aware of available public assistance." See 44 CFR § 206.202(b)(3). The grantee must submit these RPAs to FEMA within 30 days after designation of the area where the damage occurred". See 44 CFR § 206.202(c). FEMA may extend the 30-day deadline when justified, based upon extenuating circumstances beyond the grantee's and applicant's control, and when requested by the grantee. See 44 CFR § 206.202(f)(2). FEMA reviews each RPA with the grantee to ensure the applicant is eligible to receive PA assistance pursuant to 44 CFR § 206.222. See PA Guide, FEMA 322 (1999) at 64-66.

Once FEMA determines that an applicant is eligible to receive PA, FEMA meets with the applicant to discuss the PA process. Id. at 67. Applicants have 60 days from this first meeting to identify and present damage to FEMA. See 44 CFR § 206.202(d)(1)(ii). Eligible project work must be: required as a result of the declared event; located in the

disaster declared-area; and the work must be the legal responsibility of the applicant. See 44 CFR § 206.223(a).

Under the PA program, a federal inspection team accompanied by a local representative surveys the damage and estimates the scope and cost of necessary repairs. See 44 CFR § 206.202(d). The inspectors record the information they gather on Project Worksheets (“PWs”). Id. PWs document damage caused by the disaster, and list, among other information, the scope and “quantitative estimate for the eligible work.” Id.

After completion of the PWs, FEMA reviews the PWs in order to determine whether to approve funding for eligible work. Id. Thereafter, FEMA may make Federal disaster assistance funds available (*i.e.*, “obligate”) based on final PWs. See 44 CFR § 206.202(e). PWs are not contracts between FEMA and the State and/or subgrantee to pay Federal disaster assistance and do not create any right to receive any such Federal funds. See 44 CFR § 206.202(d). PWs only provide estimates, based upon the engineering analysis and on-site investigation, of the anticipated cost of a project. See id. § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635, 644 (3rd Cir. 1998)(providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States).

#### **Appeals and Arbitration**

The Stafford Act authorizes appeals of PA assistance decisions. See 42 U.S.C. § 5189(a). There are two levels of appeal — the first to the Regional Administrator, the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 CFR §

206.206(b). The American Recovery and Reinvestment Act of 2009, P.L. 111-5, established a new option, arbitration, under the PA program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603, DR-1604, DR-1605, DR-1606, and DR-1607. See 44 CFR § 206.209. A decision of a majority of the arbitration panel constitutes the final decision, binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. § 10. See 44 CFR § 206.209(k)(3).

#### **Sabine Pass Port Authority Request for Public Assistance**

The initial deadline for the State ("Grantee") to submit RPAs to FEMA on behalf of potential PA applicants in Jefferson County was October 23, 2005. See 44 C.F.R. § 206.202(c). The Grantee requested and FEMA granted a 30-day extension for applicants to submit RPAs, to **November 23, 2005**. On **December 28, 2007**, the Grantee submitted to FEMA an RPA on behalf of the SPPA. See Exhibit 3. FEMA responded to the Grantee on January 16, 2008, denying SPPA's RPA because FEMA received it more than two years after the November 23, 2005 submittal deadline. See Exhibit 4. The Grantee informed SPPA of FEMA's determination in a letter dated January 29, 2008. See Exhibit 5.

#### **PROCEDURAL HISTORY**

##### **First Appeal**

In a letter dated February 28, 2008, SPPA filed a first level appeal with FEMA. See Exhibit 6. SPPA claimed it was unaware of FEMA's PA program procedures and mistakenly believed it was applying for PA during an October 5, 2005, call by Sherri Drodgy, the manager of the damaged facility to FEMA's Individual Assistance



registration line. FEMA denied the first-level appeal in a letter to the Grantee dated March 24, 2008, because that SPPA had not identified extenuating circumstances beyond its control for submitting an RPA more than two (2) years after the regulatory deadline pursuant to 44 CFR § 206.202 (f)(2). See Exhibit 7.

### **Second Appeal**

On August 4, 2008, SPPA filed a second-level appeal with FEMA. See Exhibit 8. SPPA again claimed it believed it was applying for PA on October 5, 2005, when it called FEMA's Individual Assistance (IA) registration line and was led down the "wrong path" in its request by FEMA telephone staff.

In a letter dated June 23, 2009, FEMA denied SPPA's second-level appeal because that the SPPA had not identified extenuating circumstances for submitting an RPA more than two (2) years after the regulatory deadline pursuant to 44 CFR§ 206.202 (f)(2). See Exhibit 9.

### **Request for Arbitration**

SPPA now files this request for arbitration seeking a determination by this Panel that extenuating circumstances beyond its and the Grantee's control exist that justify extending the RPA submittal deadline more than two (2) years beyond the regulatory deadline. SPPA states that its employee's October 5, 2005, call to FEMA's Individual Assistance (IA) registration line shows "that a good faith effort was made to make a proper Request for Public Assistance before the deadline for RPA's had passed." SPPA further maintains there was widespread confusion with the PA grant process and that the Grantee State failed to provide notification of the availability of public assistance to the

SPPA. According to SPPA, “extenuating circumstances” exist beyond its and the Grantee’s control that justify extending the RPA submittal deadline more than two (2) years beyond the regulatory deadline.

## **DISCUSSION AND ANALYSIS**

### **A Brief Statement of the Case**

For a public entity to receive PA, the Grantee must first submit a completed Request for Public Assistance (RPA) for each entity seeking assistance. See 44 CFR § 206.202(c). The Grantee is responsible for, *inter alia*, “[e]nsuring that all potential applicants are aware of available public assistance. . . .” 44 C.F.R. § 206.202(b)(3). The Grantee must submit RPAs to FEMA within 30 days after designation of the area where the damage occurred. See 44 CFR § 206.202(c). FEMA may extend the 30 day deadline based upon extenuating circumstances beyond the Grantee’s and subgrantee’s control. See 44 CFR § 206.202(f)(2). FEMA reviews each RPA with the grantee to ensure the applicant is eligible to receive PA pursuant to 44 CFR § 206.222. See PA Guide, FEMA 322 (1999) at 64-66.

The State of Texas, as Grantee, is responsible for submitting to FEMA completed RPAs on behalf of potential PA applicants within 30 days following designation of the area in which the damage is located. See 44 CFR § 206.202(c) and FEMA Exhibit 3. At the Grantee’s request, FEMA extended the deadline to submit RPAs for an additional 30 days because it had determined there were extenuating circumstances beyond the control of the Grantee or potential applicants. See 44 CFR § 206.202(f)(2). This gave the Grantee until November 23, 2005, to submit RPAs on behalf of potential PA applicants.

**SPPA's Individual Assistance Registration Does Not Equate to a Request for Public Assistance Under 44 C.F.R. §206.202(c)**

SPPA argues that when its employee, Ms. Droddy, made an October 5, 2005 registration for Public Assistance through FEMA's Individual Assistance registration line, this action shows "that a good faith effort was made to make a proper Request for Public Assistance before the deadline for RPAs had passed."<sup>3</sup> SPPA admits that this call "is not the proper channel for requesting Public Assistance," but urges that extenuating circumstances exist which require that FEMA accept its RPA more than two (2) years after the RPA submittal deadline.

SPPA maintains that its October 5, 2005, call to FEMA's Individual Assistance registration line is tantamount to submitting a timely RPA. According to SPPA, it, meaning Ms. Droddy, was not "knowledgeable about the Public Assistance grant process" and its "verbal submittal was believed to be the correct path at that time."

FEMA has confirmed that Ms. Droddy registered with FEMA through its Individual Assistance registration 1-800 number on October 5, 2005, for assistance on behalf of the SPPA. She also applied for herself on September 26, 2005. She pursued this personal assistance and received a monetary grant as housing assistance. The name "Drodugy" is on the application for the SPPA facility, not her real name, Droddy. The personal application says she is Spanish-speaking. The SPPA application says she is English-

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<sup>3</sup> Immediately after a disaster declaration, FEMA sets up a central field office to coordinate the disaster response and recovery effort. FEMA publishes a toll-free telephone number for use by affected residents and business owners to register for disaster assistance through the Individuals and Households Assistance program. This disaster assistance is money or direct assistance to individuals, families and businesses in an area whose property has been damaged or destroyed and whose losses are not covered by insurance.

speaking. See FEMA Exhibit 10. In due course FEMA informed Ms. Droddy of an identification failure for the registration with the SPPA address. Mrs. Droddy did not respond to FEMA by providing required proof of identification. Therefore, FEMA did not take any further action on the registration request.

SPPA essentially argues that a registration for Individual Assistance, which failed the identification verification test, should be considered a Request for Public Assistance. FEMA, with respect to the SPPA application and, according to its practice, sent Mrs. Droddy at the SPPA address she provided, several notices, including one that she admits receiving, a notice informing her that she might be eligible for an SBA loan. See FEMA Exhibit 8 on "Exhibit C" p. 1.

Although SPPA's employee erred in not submitting her correct name and the proper Tax Identification number (she submitted her Social Security number) for SPPA with SPPA's address to the Individual Assistance hotline, that error does not negate the Grantee's and Applicant's responsibility to timely submit the Request for Public Assistance. Moreover, her Individual Assistance registration in no way reflects, contrary to her claims, that it was a request for Public Assistance for several million dollars of alleged damage caused by Rita. For these reasons alone, as well as others to be discussed below, this inaccurate verbal registration and the two-year lapse by both SPPA and the Grantee do not constitute "extenuating circumstances" beyond SPPA's and Grantee's control that would justify extending the RPA submittal deadline more than two years beyond the prescribed time period.

### **The Grantee and SPPA Failed to Timely Submit A Request for Public Assistance**

SPPA further maintains that the Grantee did not provide notification to SPPA of the availability of public assistance as required under 44 CFR § 206.202 (b)(3). SPPA attributes such absence of notification to “lack of power, access to property, no cell phone coverage, lack of mail delivery” which made it extremely difficult for potential applicants to be made aware of the availability of PA program requirements. The fact that virtually all other public entities in Jefferson County managed to submit RPAs certainly means it was quite possible to be or become aware of the PA program. Moreover, only one other PA applicant in Jefferson County out of a total of 43 entities submitted RPA’s more than one month beyond the November 23, 2005 deadline. See FEMA Exhibit 11. Given the number of applicants in Jefferson County that submitted RPAs before the regulatory deadline, SPPA’s lack of knowledge for two years cannot reasonably be attributed to FEMA, and cannot be seen as an “extenuating circumstance” when every other public entity in the County was restoring its disaster-related damaged infrastructure with Public Assistance.<sup>4</sup>

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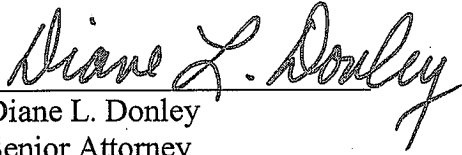
<sup>4</sup> In addition, according to SPPA, “there was such widespread confusion with the Public Assistance grant process that the Texas State Division of Emergency Management held another Briefing in Beaumont, TX on November 7, 2007.” This November 2007 meeting was held to educate existing PA applicants on FEMA grant management requirements because some confusion appeared to exist by those public or non-profit entities whose applications had been under FEMA’s review and/or administration for two years. This meeting was not an applicant briefing or kickoff meeting designed and intended for new applicants.

**SPPA's Case for "Extenuating Circumstances" Does Not Fully Reflect the Apparent Knowledge of its Board or its Attorney**

The portrait of SPPA in its request for arbitration as being entirely dependent on Ms. Droddy as "extenuating circumstances" is inaccurate. SPPA had an attorney and several "permanent employees." It was subject to governance, by a board of directors or "commissioners." Ms. Droddy contacted the SPPA's attorney for advice about and assistance with securing public funding for restoration at the facility. See FEMA Exhibit 8, EXHIBIT A, page 2. Then, on September 29, 2005, Ms. Droddy contacted all the permanent employees, including the Port Commissioner. See FEMA Exhibit 8, "Exhibit C." She even called a "Commissioner's" meeting on October 19, 2005, at the Methodist church to deal with seeking restoration funding. Id. According to Ms. Droddy, the topic of discussion at the meeting was getting funds to repair the dock facility. The Board tasked the attorney "to pursue any leads on getting assistance for the Port." Id. SPPA has not shown what efforts the attorney engaged in to contact County emergency management, the State of Texas Emergency Management or the FEMA. Had he done so, he would have been told that a simple request form called an RPA directed to the State of Texas for delivery to FEMA, would solve his problem.

Ms. Droddy dealt with her inexperience by making other staff, supervisors and SPPA's attorney aware of her concerns. SPPA tacitly admits it was not relying on Ms. Droddy's folly as notice to FEMA PA once it admitted that it retained its attorney to find some financial assistance for SPPA. Thus, any confusion by Ms. Droddy about her Individual

Respectfully submitted on this 27th day of November 2009 by,



Diane L. Donley  
Senior Attorney  
Office of Chief Counsel  
Federal Emergency Management Agency

Attachments

- Exhibit #1 – Federal Register Notice #1
- Exhibit #2 – Federal Register Notice Amendment #3
- Exhibit #3 – Request for Public Assistance
- Exhibit #4 – January 16, 2008 – FEMA denial of RPA
- Exhibit #5 – January 29, 2008 Grantee letter to Applicant
- Exhibit #6 – February 28, 2008 – Applicant first appeal letter to Grantee
- Exhibit #7 – March 24, 2008 FEMA First Appeal response letter
- Exhibit #8 – August 4, 2008 Grantee Second Appeal letter
- Exhibit #9 – June 23, 2009 FEMA Second Appeal response letter
- Exhibit #10- Individual Assistance registrations for Ms. Drodgy aka Ms Drodugy
- Exhibit #11- Printout of Jefferson County submitted RPA's
- Exhibit #12- PW D.1 Report for FEMA-1791-TX